As petitioner concedes, "there is no conflict between the circuits to support this Petition" (Pet., p. 20). The decision of the Ninth Circuit is in full accord with a prior decision of the Second Circuit (*Slenderella Systems of Berkeley v. Pacific T. & T. Co.* (2 Cir. 1961) 286 F.2d 488).

Statutes and Rules Involved.

The statutes involved in this case are sections 2a(15), 70a(5), and 311 of the Bankruptcy Act (11 U.S.C. §§ 11a(15), 110a(5) and 711). The rules of the California Public Utilities Commission involved in this case are Rule 15, Rule 17(D), Rule 23(B), and Regulations Applicable to Exchange Service.* These statutes and rules are set forth in the Petition (Pet., pp. 2-3, 6-8, 14-15). The other rules of the California Public Utilities Commission (Rules 5, 6, 10 and 11) set forth in the Petition (Pet., pp. 4-5, 9-13) are not involved in this case.

Question Presented.

The questions stated by petitioner (Pet., p. 2) are not accurate. The Court of Appeals determined that the debtor had neither possession, actual or constructive, nor ownership of the telephone numbers (Appx. to Pet., p. 15, ftn. 1). The court held that, therefore, the bankruptcy court did not have jurisdiction to act *summarily* in this controversy.

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*These rules (tariffs) have been approved by the California Public Utilities Commission and, under the law of California, they have the force and effect of law and are binding upon both Pacific and its subscribers (*Cole v. Pacific Tel. & Tel. Co.* (1952) 112 Cal.App.2d 416, 417-418, 246 P.2d 686, 688).

The question presented was correctly stated by the Court of Appeals:

> "The question here presented is whether, in arrangement proceedings under Chapter XI of the Bankruptcy Act (§§301-399), 11 U.S.C. 702-799, Pacific Telephone and Telegraph Company can summarily be ordered to provide service to the receiver under the telephone number currently being used by the debtor" (Appx. to Pet., p. 13).

Statement of the Case.

Petitioner Don Rothman (hereinafter sometimes referred to as "petitioner" and sometimes referred to as "receiver") is the Receiver of the Estate of Best Re-Manufacturing Company (hereinafter referred to as "the debtor"). Petitioner, as receiver, is in possession of the real and personal property of the debtor and operating the business of the debtor (Pet., p. 16). Respondent, The Pacific Telephone and Telegraph Company (hereinafter referred to as "Pacific"), is a public utility corporation duly organized and existing under and by virtue of the laws of the State of California (Appx. to Pet., pp. 1-2). Pacific provides telephone services, including the telephone service provided to the debtor and to petitioner, pursuant to rules and regulations (tariffs) on file with the Public Utilities Commission of the State of California (Appx. to Pet., p. 2).

On October 16, 1969, Pacific was rendering telephone service to the debtor under certain telephone numbers (Appx. to Pet., p. 2). At that time the debtor was in default under its contract of telephone service by reason of nonpayment of charges then due and owing (Appx. to Pet., p. 2).

On October 16, 1969, petitioner, as receiver, applied for and obtained an order stating that "all utility companies presently supplying * * * services to the above entitled debtor shall continue to supply said services to the said receiver" (Appx. to Pet., p. 9). Pacific thereafter filed a petition for modification of the referee's order requiring continuance of utility service. Pacific requested that the order be modified so as not to require Pacific to supply services to the receiver over the same numbers as the debtor "provided receiver receives telephone service over other telephone numbers" (Appx. to Pet., p. 9).

Pacific has been and is agreeable to furnishing telephone service to the receiver under the same telephone numbers issued to the debtor if the receiver makes an arrangement acceptable to Pacific to pay outstanding charges of the debtor in accordance with California Public Utilities Commission Rule 23 (Pet., p. 8; Appx. to Pet., pp. 3, 13-14). Pacific also has at all times been willing to furnish telephone service to the receiver under different telephone numbers from those of debtor without an arrangement pursuant to Rule 23 (Appx. to Pet., pp. 3-4, 13).

In the hearing before the referee, the parties stipulated and the referee found that the telephone equipment on the debtor's premises is owned by Pacific (Pet., p. 18; Appx. to Pet., p. 6). The parties also stipulated, and the referee found, that, in order for Pacific to render any telephone service to the debtor, Pacific has equipment and facilities located elsewhere, such as central office equipment which is not located on debtor's premises (Pet., p. 18; Appx. to Pet., p. 6).

The parties further stipulated, and the referee found, that if telephone service over the same telephone num-

bers is continued by Pacific to the debtor or receiver, no change would be necessary in Pacific's central office equipment (Pet., p. 18; Appx. to Pet., p. 6). However, if the telephone numbers are changed, it would be necessary for Pacific to make changes in its central office equipment; no change would be necessary in the telephone equipment located on the debtor's premises (Pet., pp. 18-19; Appx. to Pet., p. 6). Thus, the equipment that determines a subscriber's telephone number is located in Pacific's central offices, not on a subscriber's premises.

The referee found that a subscriber has no proprietary right in a telephone number (Appx. to Pet., pp. 3, 8). The referee also found that the telephone numbers used by the debtor were not in the possession of the bankruptcy court, that Pacific had asserted a bona fide claim adverse to the receiver, and the referee therefore did not have summary jurisdiction to issue that portion of the order sought to be modified by Pacific (Appx. to Pet., pp. 4, 8). The referee concluded that the bankruptcy court did not have jurisdiction to summarily compel Pacific to continue service over the same telephone numbers (Appx. to Pet., pp. 4, 9).

Following the hearing, the referee granted Pacific's petition. The receiver thereafter petitioned the district court for a review of the referee's order. The district court affirmed, adopting the findings of fact and conclusions of law of the referee (Appx. to Pet., p. 12). The Court of Appeals for the Ninth Circuit affirmed the judgment of the district court. The court concluded that the "debtor had neither 'possession' (actual or constructive) nor 'ownership' of the telephone number" (Appx. to Pet., p. 15, ftn. 1). Therefore, the obligations of the parties "must be resolved by plenary action" (Appx. to Pet., p. 15).

ARGUMENT.

I.

The Decision of the Court of Appeals Is Limited to the Issue of the Summary Jurisdiction of the Bankruptcy Court. The Court Followed the Established Rule That the Bankruptcy Court Has No Summary Jurisdiction in the Absence of Property Owned by, or in the Possession of, the Debtor.

A. Petitioner Misconstrues Both the Governing Law and the Decision of the Court of Appeals.

Petitioner's arguments are based upon the fundamental misconceptions of both the governing law and the scope of the decision of the Court of Appeals.

First, with respect to the governing law, petitioner erroneously contends that the bankruptcy court may exercise summary jurisdiction over "any important business right which has substantial value to the business and its creditors" (Pet., p. 22). However, the law is clear that the bankruptcy court has no *summary* jurisdiction in the absence of property owned by, or in the possession of, the debtor. This Court has pointed out that:

> "A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the court. *Thompson v. Magnolia Co.*, 309 U.S. 478, 481. If the property is not in the court's possession and a third person asserts a *bona fide* claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated 'in suits of the ordinary character, with the rights and remedies incident thereto'" (*Cline v. Kaplan* (1944) 323 U.S. 97, 98-99).

In the instant case, the debtor had no ownerhip of the telephone numbers in question and they were not in his possession.

Second, with respect to the decision of the Court of Appeals, petitioner fails to recognize that it merely applies the well-established law. It is not true, as petitioner erroneously asserts, that the decision either compels a "preference" or that it permits "the destruction of the underlying rehabilitative purposes and policies of the Bankruptcy Act" (Pet., pp. 20-21, 31-32). It is expressly limited to the question of the *summary* jurisdiction of the bankruptcy court. The Court of Appeals was clear to point out that the respective rights and obligations of the parties could be "resolved by plenary action" (Appx. to Pet., p. 15).

Petitioner's basic misunderstanding of the fundamental rules is illustrated by his reliance upon *National Ins. Co. v. Tidewater Co.* (1949) 337 U.S. 582 (see Pet., p. 24). In the very pages to which petitioner makes reference, it was noted—in a discussion of a prior decision (*Schumacher v. Beeler* (1934) 293 U.S. 367) that, "[p]ossession by the trustee not being shown," the "jurisdiction [of the bankruptcy court] was there upheld *in a plenary suit*" (337 U.S. 594, 595; emphasis added).

B. The Bankruptcy Court Did Not Have Summary Jurisdiction Over the Subject Matter of This Controversy.

Petitioner acknowledges that ownership of property is generally determined "by the courts of the state in which the Bankruptcy Court sits" (Pet., p. 22). Under the law of California, it is clear that the debtor had no ownership of the telephone numbers. The rules applicable to telephone service expressly provide that:

> "The assignment of a number to a subscriber's telephone service will be made at the discretion of the Company. The subscriber has no proprietary right in the number * * *" (Cal.P.U.C. Rule 17(D); Pet., p. 7).

In approving this Rule, the California Public Utilities Commission noted:

> "Similar rules are uniformly approved by state regulatory bodies as essential to the maintenance of efficient service to telephone subscribers generally" (*Crocker Hotel Company v. Pacific Tel. and Tel: Co.*, Decision No. 35238 (1942) 44 C.R.C. 127, 128; to the same effect: *C. O. Reynolds v. Pacific Telephone Co.*, Decision No. 65120 (1963) 60 Cal.P.U.C. 692, 696).

The California Public Utilities Commission noted that, in an appropriate case, it would examine the reasonableness of the Rule (44 C.R.C. 128; 60 Cal. P.U.C. 696). In fact, a proceeding has been initiated before the California Public Utilities Commission in which the reasonableness of the state law is questioned (*101 Plating Corporation v. The Pacific Telephone and Telegraph Company*, California Public Utilities Commission Case No. 9313). Arguments for "an expansive redefinition of the concept of 'property'" (Pet., pp. 22, 26-28) should be addressed to the California Commission in that proceeding, not to this Court.

Petitioner also erroneously infers that there is some "conflict" between the Bankruptcy Act and the law of California (Pet., p. 22). The only decision cited by petitioner in this regard which deals with the question of summary jurisdiction is *Chicago Board of Trade v. Johnson* (1924) 264 U.S. 1. That case held (264

U.S. 11-13) that a particular transferable interest—a membership in a board of trade—was property which passed into the possession of the court under § 70a(5) of the Bankruptcy Act (11 U.S.C. § 110a(5)).* It is clear under the applicable law, including that set forth in the *Johnson* case, that the elements necessary to support the summary jurisdiction of the bankruptcy court are not present in this case: the debtor does not own the telephone numbers, they were not "transferable," and they were not in his "possession."

As shown above, the debtor has no ownership of the telephone numbers under state law. In apparently arguing that such ownership exists under § 70a(5), petitioner ignores the fact that § 70a(5) by its own terms applies only to property which the debtor could have "transferred" (Bankruptcy Act, § 70a(5); 11 U.S.C. § 110a(5)). As this Court has held, property is transferable by a debtor within the meaning of section 70a(5) if it is "disposable only by his will" (*Chicago Board of Trade v. Johnson* (1924) 264 U.S. 1, 12). Telephone service, however, is subject to the express condition that the assignment of a number is "at the discretion of the Company" (Rule 17(D); Pet., p. 7). A subscriber obtains no right whatever to transfer a number at his will.

Nor could there by any argument that the debtor had "possession" of the telephone numbers. The parties stipulated that the telephone equipment on the

*None of the other cases cited by petitioner in this regard (Pet., p. 23) deals with the question of summary jurisdiction. Each held that a particular property interest—admittedly transferrable under State law—passed to the trustee in bankruptcy rather than to the bankrupt (*Segal v. Rochelle* (1966) 382 U.S. 375, 384; *Board of Trade of City of Chicago v. Weston* (7 Cir. 1917) 243 Fed. 332, 335-336; *Garber v. Bankers' Mortgage Co.* (D.Kan. 1928) 27 F.2d 609, 610, 612).

debtor's premises and in Pacific's central offices is owned exclusively by Pacific (Pet., p. 18; Appx. to Pet., p. 6). A telephone number is itself an incident of the switching equipment which is located in Pacific's central offices (Pet., pp. 18-19; Appx. to Pet., p. 6). There thus could be no physical possession of the numbers by the debtor.

If it be argued that there was constructive possession, this Court has held that one has constructive possession of an "incorporeal right" only if that "right" can be "continuously enjoyed" (*Chicago Board of Trade v. Johnson* (1924) 264 U.S. 1, 12). A telephone number, however, is subject to change at the discretion of Pacific and, from time to time, numbers are changed for reasons beyond the control of subscribers (Cal. P.U.C. Rule 17(D); Pet., p. 7; Appx. to Pet., p. 3). Hence a telephone number cannot be "continuously enjoyed" by a subscriber. A subscriber at most has only a contract right—or a license—to use a particular number.

In a similar case, the Second Circuit held that:

> "The license to use a specific telephone number does not amount to the possession required as a basis for summary jurisdiction" (*Slenderella Systems of Berkeley v. Pacific T. & T. Co.* (2 Cir. 1961) 286 F.2d 488, 490).

As that court held, any controversy with respect to rights under a contract must be resolved by means of a plenary action:

> "Where a substantial issue of law or fact exists as to title, and where the debtor was not in physical possession of the property on the date of filing his petition, the rights under the contract should not be settled in a summary proceeding" (286 F.2d 490).

II.

Section 311 of the Bankruptcy Act Does Not Give the Bankruptcy Court Summary Jurisdiction Over This Controversy.

Petitioner also argues that the bankruptcy court acquired summary jurisdiction under section 311 of the Bankruptcy Act (Pet., p. 29). Section 311, however, provides no basis for a departure from the fundamental rule that the bankruptcy court's summary jurisdiction is limited to the property of the debtor. It expressly provides that the bankruptcy court has "exclusive jurisdiction of the debtor *and his property*" (11 U.S.C. § 711; Pet., p. 3; emphasis added).

Nor is there any basis for petitioner's apparent argument that the bankruptcy court may obtain summary jurisdiction in the absence of property of the debtor by virtue of the court's general equity powers and its powers of general administration (see Pet., pp. 29-31). Those general powers, as well as the Act's rehabilitative goal, may provide "a basis for the exercise of jurisdiction in cases where jurisdiction exists" (*In re Adolf Gobel, Inc.* (2 Cir. 1936) 80 F.2d 849, 853); but they can confer "no power to protect non-existent jurisdiction" (*Monte Vista Lodge v. Guardian Life Ins. Co. of America* (9 Cir. 1967) 384 F.2d 126, 129). None of the cases cited by petitioner (Pet., pp. 29, 30) is to the contrary; each pertained to property of the debtor which was in the possession of the court (*Mangus v. Miller* (1942) 317 U.S. 178, 184; *U.S. Fidelity Co. v. Bray* (1912) 225 U.S. 205, 206, 215, 216; *In re Fleetwood Motel Corporation* (3 Cir. 1964) 335 F.2d 857, 858-859; *In re United States Realty & Improvement Co.* (2 Cir. 1946) 153 F.2d 853,

854; *In re Bargain City, U.S.A., Inc.* (E.D. Pa. 1962) 212 F.Supp. 111, 115, 116).

Conclusion.

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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